

E. Miller

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROYAL YATES,)
)
Plaintiff(s),)
)
v.)
)
GUNN ALLEN FINANCIAL and)
CURT WILLIAMS,)
)
Defendant(s).)
_____)

No. C05-1510 BZ

FINAL JURY INSTRUCTIONS

Dated: November 16, 2006



Bernard Zimmerman
United States Magistrate Judge

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

The evidence from which you are to decide what the facts are consists of:

- (1) the sworn testimony of any witness;
- (2) the exhibits which have been received into evidence; and
- (3) any facts to which the lawyers have agreed or stipulated.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. For example, the witness testifies, "I saw Joe break the glass." Circumstantial evidence is proof of one or more facts from which you could find another fact. For example, the witness testifies, "I saw Joe holding the glass before I left the room. No one else was in the room. When I returned, the broken glass was lying at Joe's feet." You could find that Joe had broken the glass in either example. You must consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness' memory;
- (3) the witness' manner while testifying;
- (4) the witness' interest in the outcome of the case and any bias or prejudice;
- (5) whether other evidence contradicted the witness' testimony;
- (6) the reasonableness of the witness' testimony in light of all the evidence; and
- (7) any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

You have heard testimony from a person who, because of education or experience, is permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion, and all the other evidence in the case.

All parties are equal before the law and a corporation is entitled to the same fair and conscientious consideration by you as any party.

In a prior trial, a jury found that defendants churned Mr. Yates' account. This means that Mr. Yates has proven the elements of churning:

(1) that the trading in the plaintiff's brokerage account was excessive in light of the plaintiff's investment objectives;

(2) that the defendants exercised control over the trading in the account;

(3) that the defendants acted with intent to defraud or with reckless disregard of the plaintiff's investment objectives; and

(4) that the defendants' conduct caused damage to the plaintiff.

The prior jury found that Mr. Yates sustained actual damages in the amount of \$240,382. In addition to that sum, Mr. Yates has been awarded prejudgment interest in the amount of \$35,941.92.

The prior jury also determined that punitive damages should be awarded against Curtis Williams, the GunnAllen agent who handled Mr. Yates' account. That jury awarded Mr. Yates \$120,191 in punitive damages against Mr. Williams.

The jury also determined that punitive damages should be awarded against GunnAllen. In doing so, the jury determined that:

1. it was appropriate to punish GunnAllen and to discourage similar conduct in the future; and

2. that GunnAllen's conduct was malicious, oppressive or in reckless disregard of the plaintiff's rights.

Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another.

Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety and rights, or the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's legal rights.

An act or omission is oppressive if the person who performs it injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of the plaintiff.

You must now decide the amount of punitive damages, if any, that should be awarded against GunnAllen.

Plaintiff must prove the facts supporting the amount of any award of punitive damages by clear and convincing evidence. This means that Mr. Yates must prove that it is highly probable that the facts are true.

There is no fixed standard for determining the amount of punitive damages and you are not required to award any punitive damages.

You should consider all of the following in determining the amount:

(a) How reprehensible was GunnAllen's conduct?

(b) Is there a reasonable relationship between the amount of punitive damages and Mr. Yates' harm?

(c) In view of GunnAllen's financial condition, what amount is necessary to punish it, and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because GunnAllen has substantial financial resources.

In determining whether GunnAllen's conduct was reprehensible, you should consider only:

1. the conduct of one or more officers, directors, or managing agents of GunnAllen, who acted on behalf of GunnAllen;
2. any conduct that was authorized by one or more officers, directors, or managing agents of GunnAllen; or
3. any conduct that any officer, director or managing agent of GunnAllen knew constituted malice, oppression or fraud, and adopted or approved after it occurred.

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making so that his or her decisions ultimately determine corporate policy.

In determining the reprehensibility, if any, of GunnAllen's conduct, you should consider whether:

- the harm caused was physical as opposed to economic;
- the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
- the target of the conduct had financial vulnerability;
- the conduct involved repeated actions or was an isolated incident;
and
- the harm was the result of intentional malice, trickery, or deceit, or mere accident.

When you begin your deliberations, you should elect one member of the jury as your presiding juror. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Some of you have taken notes during the trial. Whether or not you took notes, you should rely on your own memory of what was said. Notes are only to assist your memory. You should not be overly influenced by the notes.

If it becomes necessary during your deliberations to communicate with me, you may send a note through Ms. Scott, signed by your presiding juror or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone-including me-how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror will fill in the form as appropriate, sign and date it as appropriate, and advise the court that you are ready to return to the courtroom.